UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHILIP J. CHARVAT, on behalf of himself and others similarly situated,	:	Case No. 16-cv-00120
Plaintiff,	:	Judge James L. Graham
v.	:	Magistrate Judge Kimberly A. Jolson
SHAMPAN LAMPORT, LLC,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant SHAMPAN LAMPORT, LLC ("Shampan"), by and through its undersigned attorneys, respectfully submits this Memorandum of Law in support of its Motion to Dismiss.

PRELIMINARY STATEMENT

Shampan respectfully requests that this Court dismiss this action pursuant to its inherent power to control its docket, or in the alternative, F.R.C.P. Rule 12(b)(6), pursuant to the other suit pending doctrine, as it is redundant to the already-pending (but stayed pursuant to appeal) lawsuit *Charvat v. National Holdings Corporation*, Docket No. 14-cv-02205. It is respectfully submitted that the Court was not aware of the relationship between the Defendants in these two cases when issuing its order that same are not related. In addition, as set forth in more detail below, and in the affirmation of Timothy Feil, Esq., this lawsuit is circumventing the stay imposed by Judge Frost in that action.

For the reasons set forth herein, Defendant respectfully asserts that this matter should be dismissed.

STATEMENT OF FACTS

The Court is respectfully referred to the accompanying Declaration of Timothy Feil, Esq. for a full recitation of the relevant facts.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED PURSUANT TO THE OTHER SUIT PENDING DOCTRINE

It is a long-standing principle of law that there should only be a single lawsuit pending regarding the same matter, and that duplicative lawsuits should be dismissed. This defense is referred to as the plea of the "other suit pending doctrine," and arises from the Court's inherent power to control its own docket[1]. "The doctrine is also meant to protect parties from 'the vexation of concurrent litigation over the same subject matter'." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) *citing Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991).

"As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit." *Curtis*, 226 F.3d at 138, *citing Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976). "As between federal district courts... though no precise rule has evolved, the general principle is to avoid duplicative litigation." *Smith v. S.E.C.*, 129 F.3d 356, 361 (6th Cir. 1997) *quoting Colorado River*, 424 U.S. at 817. "The complex problems that can arise from multiple federal filings do not lend themselves to a rigid test, but require instead that the district court consider the equities of the situation when exercising its discretion." *Curtis*, 226 F.3d 133 at 138.

"When a federal court is presented with such a duplicative suit, it may exercise its discretion to stay the suit before it, to allow both suits to proceed, or, in some circumstances, to enjoin the parties from proceeding in the other suit." *Smith*, 129 F.3d at 361, *citing Kerotest Mfg.*

[1] Though some courts have considered such motions to dismiss pursuant to F.R.C.P.12(b)(6). *See Morency v. Village of Lynbrook*, 1 F.Supp.3d 58, 61 (E.D.N.Y. 2014) at FN 7.

Co. v. C–O–Two Fire Equip. Co., 342 U.S. 180, 183-84 (1952). "Of course, simple dismissal of the second suit is another common disposition because plaintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time." *Curtis*, 226 F.3d at 138-139, *citing Zerilli v. Evening News Ass'n*, 628 F.2d 217, 222 (D.C. Cir.1980).

Indeed, this has been the rule for U.S. Federal Courts for over a century:

> The true test of the sufficiency of a plea of 'other suit pending' in another forum was the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit. The efficiency of the test, thus applied, results from the fact that the elements constituting the thing adjudged, and those necessary for the plea of 'other suit pending,' are identical.

The Haytian Republic, 154 U.S. 118, 124 (1894), *citing Dick v. Gilmer*, 4 La.Ann. 520 (1849).

Furthermore, it has long been the general rule that the Court "which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree." *Watson v. Jones*, 80 U.S. 679, 715 (1871).

Finally, "duplicative complaints may be not be filed by a plaintiff "for the purpose of circumventing the rules pertaining to the amendment of complaints." *Morency* 1 F.Supp.3d at 62, *citing Curtis v. Dimaio*, 46 F.Supp.2d 206, 216 (E.D.N.Y. 1999), *and Walton v. Eaton Corp.* 563 F.2d 66, 71 (3d Cir. 1977).

Though Sixth Circuit decisions such as *Smith* and *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538 (6th Cir. 1978) have explicitly held that there are no "rigid" rules regarding dismissal of redundant cases, several courts have noted some general principles as to when a duplicative case is properly dismissed. *Roth* noted that the standards for enjoining a lawsuit are less stringent than those for the issuance of a preliminary injunction[2]. *Id.* The Seventh Circuit has held that generally, a suit is duplicative if the "claims, parties, and available relief do not significantly differ between the two actions." *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir.1993). And as the Supreme Court stated in *The Haytian Republic*:

> When the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or, at least, such as represent the same interests; there must be the same rights asserted and the same relief prayed for; the relief must be founded upon the same facts, and the title, or essential basis, of the relief sought must be the same.

The Haytian Republic, 154 U.S. at 124, *quoting Watson*, 80 U.S. at 679.

The instant matter certainly meets this set of non-rigid standards. As more fully set forth in the declaration of Timothy Feil, on or about November 11, 2014, Plaintiff filed a Summons and class-action Complaint (Docket No. 14-cv-02205, the "*National Holdings* Matter") initiating a lawsuit against National Holdings Corporation, the holding and parent company of National Securities Corporation ("NSC") for alleged violation of the Telephone Consumer Protection Act (47 U.S.C. §227, the "TCPA"), for receiving telemarketing phone calls purportedly from NSC on August 28, 2012; September 5, 2012; September 6, 2012; September 7, 2012; and September 19, 2012; while his name and telephone number were allegedly on the National Do Not Call Registry. *See* Feil Decl., Ex. B, ¶¶ 1, 18. Plaintiff asserts causes of action for violation of the TCPA's Do Not Call provisions and Violation of the TCPA's Internal Do Not Call List Requirement, and seeks an Injunction preventing further violations. This matter is currently stayed pending an appeal to the Sixth Circuit of the denial of National Holdings' Motion to Dismiss. The Sixth Circuit has issued its own stay of the appeal pending the decision of identical issues before the United States Supreme Court and other previously-filed matters pending before the Sixth Circuit.[3]

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[2] Though *Roth* dealt with lawsuits in different Federal Districts, Defendant asserts there is no rationale to restrict *Roth*'s application to such cases, and other cases such as *Morency* and *Curtis* addressed the issue regarding multiple lawsuits in the same district, as applies in the instant case.

Plaintiff now brings the instant lawsuit against Shampan Lamport, LLC (which is a company that operates two branch offices of NSC in New York State), for the exact same conduct as alleged in the *National Holdings* Matter, namely violation of the Telephone Consumer Protection Act (47 U.S.C. §227, the "TCPA"), for receiving telemarketing phone calls from National Holdings Corporation on August 28, 2012; September 5, 2012; September 6, 2012; September 7, 2012; September 19, 2012; and February 27, 2013, while his name and telephone number were allegedly on the National Do Not Call Registry. *See* Feil Decl., Ex. A, ¶¶ 1, 15. Plaintiff likewise asserts causes of action for violation of the TCPA's Do Not Call provisions and seeks an Injunction preventing further violation.

Applying the non-rigid factors outlined in *The Hayitian Republic*, it is respectfully submitted that the instant matter should be dismissed in its entirety. The Plaintiff is the same in both cases. The Defendants, though different, still represent the same interests, namely, the purported making of the exact same telephone calls in violation of Plaintiff's rights. "It is 'nonfatal to that plea [of the other suit pending] that the parties are not identical,' as 'they need not be if their interests are aligned'." *Morency*, 1 F.Supp.3d at 62 *quoting Curtis*, 46 F.Supp.2d at 215. In *Charvat v. National Holdings Corp.*, the Defendant is the holding company for NSC as a whole; in *Charvat v. Shampan Lamport, LLC*, the defendant is the holding company for two specific branch offices of NSC. Unless Plaintiff is alleging that he received improper telephonic solicitations from different branch offices of NSC on the exact same day no less than five times (an assertion which is not only absent from his complaint, but is highly implausible), he is clearly

[3] *See* the Order of the Sixth Circuit Court of Appeals, staying the appeal and directing National Holding Corporation's counsel to apprise them of the status of the matters before the Supreme Court, attached to the Feil Decl. as Exhibit E.

complaining of the same telephone calls in each lawsuit. Finally, the same relief is prayed for in both complaints based upon the same underlying set of facts (an injunction barring future violations, an injunction preventing destruction of records, $500 statutory damages for each negligent violation of the TCPA, and $1,500 statutory damages for each intentional violation).

Plaintiff clearly instituted this second lawsuit as a thinly-veiled effort to circumvent the stay in the *National Holdings* Matter. As more fully set forth in the accompanying Declaration of Timothy Feil, the *National Holdings* Matter is stayed pending appeal of the denial of National Holdings' Motion to Dismiss. Plaintiff's counsel, Mr. Anthony Paronich, sought – and received – a lifting of the stay "for the limited purpose of allowing Plaintiff to discover the identities of any third-party telemarketers, phone companies, lead generators, or other third parties involved in calling Plaintiff and other members of the putative class, and to allow Plaintiff's counsel to issue subpoenas to those parties." *See* Feil Decl., Ex F. Mr. Paronich sent Shampan a subpoena which exceeded this limited scope. *See* Feil Decl., Ex G. In response to same, Mr. Feil, on behalf of Shampan, provided responsive documents in good faith that were in accordance with Judge Frost's Order, but refused to respond to the portion of the subpoena that was outside the scope of this order. *See* Feil Decl., Ex H. Mr. Paronich, during a heated exchange, then threatened filing the instant lawsuit unless Shampan complied with his demands for information, which Shampan refused to do in good faith as it was outside the scope of Judge Frost's Discovery Order. *See* Feil Decl., ¶ 9.

Defendant, therefore, respectfully asserts that Plaintiff brought this separate complaint both in order to have a vehicle to circumvent Judge Frost's limited discovery order during the stay of Plaintiff's original lawsuit against National Holdings Corp., instead of simply seeking leave to amend his complaint to include Shampan in the *National Holdings* Matter when the stay is lifted.

As an aside, while it is true that Judges Graham and Frost issued an order upon the filing of this lawsuit finding that the two cases are not related[4], it is respectfully submitted that this finding should be reconsidered in light of the facts as set forth herein; and upon information and belief, the lack of identification or recognition by Plaintiff that Shampan is and was a branch office of NSC. Defendant respectfully asserts that the Order finding that the cases were not related was made without the knowledge that Shampan was simply a holding company for the branch offices of NSC that allegedly made the telephone calls at issue in the *National Holdings* Matter. Therefore, the question of whether these cases are related should be (and indeed, must be) revisited based upon the true relationship of the parties as indicated herein.

II: IN THE ALTERNATIVE, THE TWO LAWSUITS MAY BE CONSOLIDATED PURSUANT TO FRCP 42

FRCP 42(a) provides:

> (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:
> (1) join for hearing or trial any or all matters at issue in the actions;
> (2) consolidate the actions; or
> (3) issue any other orders to avoid unnecessary cost or delay.

"In exercising its discretion, a court should weigh 'the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice'." *Banacki v. OneWest Bank, FSB*, 276 F.R.D. 567, 571 (E.D.MI 2011) *quoting In re Consolidated Parlodel Litig.*, 182 F.R.D. 441, 444 (D.N.J.1998). Courts have described this balance as:

> whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple law suits, the length

[4] *See* Feil Decl., Ex. J.

> of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Banacki, 276 F.R.D. at 571-572, *quoting Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir.1982).

It is beyond dispute that the lawsuits against National Holdings and Shampan consider common questions of law and fact. Should these lawsuits be allowed to proceed independently, there is a possibility of both inconsistent results (which is undesirable), and a double recovery (which is impermissible). *See, e.g., In re Magnesium Corp of America*, 278 B.R. 698 (S.D.N.Y. 2002), "…such an effort by this Court would raise equally undesirable risks of res judicata…or, alternatively, inconsistent results. Neither of those alternatives, in this Court's view, is consistent with justice or thoughtful judicial administration." *See, e.g., Johnson v. Howard*, 24 Fed.Appx. 480, 484 (6^{th} Cir. 2001): "A party is not entitled to recover twice for the same loss, even if the party would otherwise be able to recover for that loss under separate theories of liability." It would additionally duplicate all the work and expenses involving Plaintiff's allegations, and unnecessarily duplicate the burden on third party witnesses.

A single lawsuit incorporating the claims against both National Holdings and Shampan Lamport would eviscerate all of these potential problems. Such a joinder is permissible under Rule 42, and under the circumstances of this case, is very much warranted.

Therefore, if this Court declines to dismiss this matter pursuant to the Doctrine of Other Suit Pending, this matter should be consolidated into the National Holdings matter, and become subject to the stay until the Sixth Circuit and Judge Frost lift same.

CONCLUSION

For all of the above-stated reasons, therefore, it is respectfully submitted that the Summons and Complaint should be dismissed in its entirety, or in the alternative, consolidated with the already-pending *Charvat v. National Holdings Corporation* matter, and subject to that case's stay.

Dated: April 15, 2016
Columbus, Ohio

/s Michael D. Dortch
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CERTIFICATE OF SERVICE

I Hereby Certify That Service Was Made Upon All Parties having entered their appearances in this matter by means of the Court's PACER notification system.

/s Michael D. Dortch